No. 137, Original

In the Supreme Court of the United States

STATE OF MONTANA, PLAINTIFF

v.

STATE OF WYOMING AND STATE OF NORTH DAKOTA

ON EXCEPTIONS TO THE FIRST INTERIM REPORT OF THE SPECIAL MASTER

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE OPPOSING PLAINTIFF'S EXCEPTION

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QUESTIONS PRESENTED

In this case Montana alleges that Wyoming has breached the Yellowstone River Compact (Compact) by consuming more water than is permitted under the Compact, in four specific respects. Wyoming has moved to dismiss the bill of complaint. The Special Master has recommended that Wyoming's motion to dismiss be denied and concluded that three of Montana's theories state a claim of Compact breach, to the extent that Montana can show that Wyoming's use of the practices alleged have left pre-1950 users in Montana without enough water and without any recourse under Montana law. The Special Master concluded, however, that Montana's fourth theory fails to state a claim. That theory alleges that certain users in Wyoming are diverting the same amount of water as they did before the Compact, but consuming more of those diversions through increased efficiencies, so that less water returns to the river and is available for use downstream in Montana. The questions presented by Montana's exception are as follows:

1. Whether the Special Master correctly concluded that Montana's increased-efficiency allegation does not state a claim for breach of the Compact.

2. Whether the Special Master correctly concluded that, to show that Wyoming has breached the Compact and caused Montana injury, Montana must show that its water users lack an intrastate remedy under Montana law.

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INTEREST OF THE UNITED STATES

Wyoming's motion to dismiss presents several questions concerning the Yellowstone River Compact, an interstate agreement negotiated with federal participation, approved by Congress, and possessing the status of federal law. The United States administers water projects throughout the Yellowstone River Basin that may be affected by the Court's construction of the Compact. Pursuant to *Winters* v. *United States*, 207 U.S. 564 (1908), the United States also holds certain rights to waters of the Yellowstone River system in trust for the Indian Tribes whose reservations lie in the river basin. At the Court's invitation, the United States filed a brief addressing Montana's motion for leave to file a bill of complaint. The United States also filed a brief addressing Wyoming's motion to dismiss, which was referred to

the Special Master, and presented both written and oral submissions in the proceedings before the Special Master.

STATEMENT

This Court granted Montana leave to file a bill of complaint alleging that Wyoming has breached the Yellowstone River Compact (Compact) in four respects. The Court also invited Wyoming to file a motion to dismiss, which the Court referred to Special Master Barton H. Thompson, Jr. The Special Master has recommended that the Court deny Wyoming's motion in nearly all respects. Wyoming has not excepted to that recommendation. Montana, however, has excepted to two portions of the First Interim Report of the Special Master (Report).

1. The Compact is an agreement among Wyoming, Montana, and North Dakota. See Act of Oct. 30, 1951, ch. 629, 65 Stat. 663 (approving and reprinting the Compact).[1] The Compact allocates the water supply of the Yellowstone River system among those States. Art. V, 65 Stat. 666. Montana alleges that Wyoming has breached the Compact by taking water to which Montana is entitled from the Tongue and Powder Rivers, tributaries of the Yellowstone that flow from Wyoming into Montana. Compl. ¶¶ 9-13; Br. in Supp. of Compl. 19.

The Yellowstone River Basin is an approximately 70,100-square-mile watershed encompassing parts of Wyoming, Montana, and North Dakota. The mainstem of the Yellowstone River rises in the Wyoming portion of Yellowstone National Park, flows north into Montana, crosses Montana in a northeasterly direction, and joins the Missouri River just after crossing the border into North Dakota.

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[1] The text of the Compact is set out in Appendix A to the Report.

This litigation involves the Tongue and Powder Rivers, tributaries of the Yellowstone that rise in Wyoming's Bighorn Mountains and cross into Montana to join the Yellowstone mainstem. The principal use of water diverted from both tributaries is for irrigation within Wyoming and Montana. The Tongue River serves as the primary water source for the Northern Cheyenne Indian Reservation, which is in south-central Montana adjacent to the river.

In addition to the Tongue and Powder Rivers, the Compact also regulates two other interstate tributaries of the Yellowstone: the Bighorn River (except for its tributary the Little Bighorn River) and the Clarks Fork Yellowstone River. Art. II(F), 65 Stat. 665. Although no compact violation is alleged regarding the Bighorn or Clarks Fork Yellowstone, the water rights and administration in those river basins (including Indian water rights associated with the Crow Indian Reservation and the Wind River Reservation) may be affected by any interpretation of the Compact in this litigation.[2]

2. The Compact is the product of nearly 20 years of intermittent negotiations, authorized by Congress with the goal of reaching "an equitable division and apportionment * * * of the water supply of the Yellowstone River" and its tributaries. Act of June 2, 1949, ch. 166, 63 Stat. 153; Act of June 14, 1932, ch. 253, 47 Stat. 306; see Wyo. Br. in Supp. of Mot. to Dismiss 12-17; Mont. Br. in Resp. to Mot. to Dismiss 2-3. The three States reached agreement on December 8, 1950, and the resulting Compact was subsequently ratified by the state legislatures and approved by Congress in accordance with

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[2] Under the *Winters* doctrine, the United States holds reserved water rights in trust for the Tribes. See p. 1, *supra*.

the Compact Clause of the Constitution, Art. I, § 10, Cl. 3. See Act of Oct. 30, 1951, 65 Stat. 663.

In fulfillment of Congress's goal, the Compact provides for the division of the Yellowstone River Basin's water supply. The preamble declares that the Compact is intended to "remove all causes of present and future controversy between said States * * * with respect to the waters of the Yellowstone River and its tributaries, other than waters within or waters which contribute to the flow of streams within the Yellowstone National Park." 65 Stat. 663. The preamble further states that the parties "desire[] to provide for an equitable division and apportionment of such waters," and that they acknowledge that "the great importance of water for irrigation" shall be recognized "in future projects or programs for the regulation, control and use of water in the Yellowstone River Basin." *Ibid.* The Compact governs the waters of the entire Yellowstone River System, with principal focus on the waters of the four "Interstate Tributaries," *i.e.*, the Tongue, Powder, Clarks Fork Yellowstone, and Bighorn Rivers. Art. II(F), 65 Stat. 665.[3]

The operative provision at issue here, Article V, provides for the division of water between Montana and Wyoming according to a three-tiered framework. Article V(A) sets out the first tier: it provides that "[a]ppro-

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[3] Water for domestic use and (in moderate amounts) for watering livestock is excluded from the Compact altogether. Art. V(E), 65 Stat. 667. Indian water rights, too, are effectively excluded from the scope of the present dispute between Montana and Wyoming. Article VI provides that "[n]othing contained in this Compact shall be so construed or interpreted as to affect adversely any rights to the use of [Yellowstone River System waters] owned by or for Indians." 65 Stat. 668; see also U.S. Invitation Br. 8 n.3 (explaining possible implications for the Northern Cheyenne).

priative rights to the beneficial uses of the water of the Yellowstone River System existing in each signatory State as of January 1, 1950, shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." 65 Stat. 666. The doctrine of appropriation generally provides that a person who diverts water and puts it to a beneficial use retains the right to use that water, on a "first in time, first in right" basis, although only to the extent the water is reasonably required and actually used. See, *e.g.*, *Arizona* v. *California*, 298 U.S. 558, 565-566 (1936); p. 18, *infra*.

Article V(B) sets out the second and third tiers. 65 Stat. 666. Of the water of the interstate tributaries that is "unused and unappropriated" as of January 1, 1950, the second-tier allocation permits each State to divert water necessary to supplement its first-tier rights. Those supplemental rights, too, are to be acquired and used pursuant to the doctrine of appropriation. *Ibid.* The third-tier allocation gives each State a specified percentage of any remaining "unused and unappropriated" water in each of the four interstate tributaries. Art. V(B), 65 Stat. 666-667. The quantities of water available to third-tier uses in each river, and the amounts actually diverted by each State, are to be calculated annually. Art. V(C), 65 Stat. 667.

The Compact creates a Yellowstone River Compact Commission to administer the Compact as between Montana and Wyoming. (North Dakota does not participate in the Commission.) The Commission includes one representative from each of the two States and a federally appointed chairman, who has no vote except in case of tie votes on certain core matters. Art. III(A) and (F),

65 Stat. 665, 666. Historically the Commission has not served as a forum for resolving water-rights disputes.

3. Montana alleges that in some recent years, there has been insufficient water available in the Powder and Tongue Rivers to satisfy pre-1950 water rights in Montana under the Compact's first tier. Compl. ¶¶ 14-16; Br. in Supp. of Compl. 14, 17. Montana further alleges that while it has been short of water even for pre-1950 uses, Wyoming has permitted upstream diversions from these two interstate tributaries to *post*-1950 uses. Montana contends that when Montana's first-tier rights are not satisfied, there is no "unused and unappropriated" water to be allocated between the States pursuant to the Compact's second and third tiers, and that in those circumstances diversions in Wyoming for post-1950 uses violate the Compact.

Montana has specified four categories into which the allegedly impermissible diversions to post-1950 uses fall. In the allegation relevant here, Montana contends that some Wyoming water users who hold pre-1950 rights are consuming more water than they did in 1950 by implementing new irrigation methods that result in less water making its way back to the stream in the form of return flows, even though the same amount of water is initially diverted from the stream, for the same use, on the same parcel of land, as in 1950. The water gains from increased efficiencies, Montana contends, are not within the scope of the pre-1950 water rights protected by Article V(A) of the Compact, and so must yield to Montana's pre-1950 rights. Compl. ¶ 12; Mont. Br. in Supp. of Exception 3-4 (Mont. Exception Br.); Br. in Supp. of Compl. 15-16. Montana's three other theories of Compact breach involve alleged interference with Montana's pre-1950 rights through use of new storage

reservoirs, irrigation of new acreage, and reduction of flows in the Tongue and Powder Rivers caused by groundwater pumping in Wyoming. Compl. ¶¶ 9-11.

4. This Court granted Montana leave to file its complaint, and invited Wyoming to submit the instant motion to dismiss. 552 U.S. 1175 (2008). The United States submitted a brief substantially agreeing with Montana and opposing the motion to dismiss, except with respect to the theory that increased efficiencies may amount to a Compact breach.

This Court referred the motion to dismiss and other matters to Special Master Thompson, 129 S. Ct. 480 (2008), who entertained oral argument and further briefing before submitting the Report that is the subject of Montana's exception.

5. The Special Master recommended that the motion to dismiss be denied. He agreed with Montana's interpretation of how the Compact protects pre-1950 rights against interference from post-1950 users, and he agreed that three of Montana's theories state a claim for breach of the Compact, as so interpreted. Wyoming has not excepted to any of those rulings.

a. The Special Master concluded, however, that Montana's increased-efficiency allegation failed to state a claim for breach of the Compact. Report 54-88, 90. That theory, the Special Master noted, "involve[d] a conflict between two sets of pre-1950 uses," unlike Montana's other theories. Report 56. Because the Compact negotiators decided not "to create a unitary system for regulating and administering pre-1950 appropriative rights," *ibid.*, Montana could not state a claim unless the Compact excluded these increased-efficiency gains from the scope of pre-1950 rights. The Special Master concluded that the Compact did not do so. Report 86-88, 90.

First, the Special Master noted that the Compact's language regulates the diversion of water to beneficial use, not the actual consumption of water net of return flows. Report 60-61. The Compact's definition of "beneficial use"—like the commonly understood meaning of that term in western water law—does not specify that the appropriative right is limited to the amount of water consumed; rather, the Special Master concluded, it permits any use that actually depletes a waterway to be the basis for an appropriative right. Report 61.

Second, the Special Master concluded that the "doctrine of appropriation," as referred to in Article V(A) of the Compact, did not preclude Wyoming from allowing its pre-1950 appropriators to retain the benefit of increased irrigation efficiencies. Report 64-85. The Special Master noted as an initial matter that ascertaining the content of that doctrine (as used in the Compact) would be difficult if the laws of Wyoming and Montana were to diverge on any relevant point, or if the law had materially changed since the Compact was adopted, but that "[t]hankfully," those issues were not presented because there was no conflict of law on these points. Report 39-40. Proceeding to examine that law, the Special Master concluded that Wyoming decisions "strongly indicate[d] that Wyoming appropriators are free to increase consumption on existing acreage through improved irrigation techniques"; that nothing in Montana law "contradict[ed] this rule," although "Montana law is ultimately inconclusive"; and that "[t]he appropriation law of other states does not suggest that Wyoming's rule is anomalous, although some courts might reach different results." Report 86.

The Special Master also noted that Wyoming's rule permitting water users to retain the benefits of their

improved efficiency is a reasonable one, because it "encourages increased conservation" by creating "an incentive * * * to invest in improved irrigation techniques." Report 87.

Finally, the Special Master observed that the significance of this issue is "inherently limited," because it applies only to efficiency gains that are realized and used on the same lands that were being irrigated as of January 1, 1950—not on new lands, or for new purposes. Report 87.

b. Separately, the Special Master observed that in continuing to litigate its other theories of Compact breach, "Montana may not always need to invoke Article V(A) to protect its pre-1950 uses," because "[w]here Montana can remedy the shortages of pre-1950 appropriators in Montana through purely intrastate means that do not prejudice its other rights under the Compact, an intrastate remedy is the appropriate solution." Report 27; see Report 89. The Special Master deferred consideration of "when 'intrastate' remedies are adequate" until after further factual development. Report 28.

SUMMARY OF ARGUMENT

A. The Special Master correctly concluded that the Compact does not override Wyoming's law of prior appropriation concerning increased irrigation efficiencies.

Significant improvements in irrigation techniques have enabled an irrigator to use the water he diverts more efficiently and thus to reduce the amount of water lost in the process of moving water from river to crops. Under Wyoming law, the irrigator can retain the benefit of that improved efficiency: he keeps the same priority date and flow rate for his diversion under the doctrine of

appropriation, because he is diverting the same amount of water from the river and using it on the same field for the same purpose. The only difference is that more of the diverted water actually reaches the fields to sustain the crops and less returns to the river as return flows.

Contrary to Montana's contentions, nothing in the Compact overrides that principle of Wyoming law. The text of the Compact does not require that state-law water rights protected by Article V(A) be limited to the amount of water that was actually consumed by crops in 1950; to the contrary, the text is consistent with the background principles of water law that treat the amount of water *diverted* for beneficial use as what matters. Nor does the Special Master's interpretation create any anomaly: it is simply a consequence of the Compact drafters' explicit decision to peg each State's rights under Article V(A) to the rights that water users in each State enjoyed under the doctrine of appropriation on January 1, 1950.

B. The Court need not resolve at this point the extent to which Montana may seek relief against Wyoming for breach of the Compact even when pre-1950 water uses in Montana have an intrastate remedy for any shortage. If the Court reaches the question, it should sustain the Special Master's conclusion that the unavailability of intrastate remedies is a prerequisite. Because of the way Article V(A) of the Compact is structured, Montana's rights under the Compact are derivative of its water users' rights. Where Montana's pre-1950 users already have recourse under state law to remedy any water shortage, Wyoming has caused them no injury and cannot be said to have breached the Compact.

ARGUMENT

The motion to dismiss should be resolved in accordance with the Special Master's recommendation. The Special Master correctly understood that the Compact provides enforceable protection to the pre-1950 water users in each State, but that to state a claim under the Compact for breach of that protection, Montana must show that its pre-1950 users are short of water and that Wyoming users caused the shortage by diverting water to post-1950 uses. Montana's theory based on increased irrigation efficiencies in Wyoming does not state a claim for breach of that protection, because Wyoming law permits a water user to increase the efficiency of an appropriation without "changing" the original water right or requiring a new water right, and Montana has not shown that the Compact overrides that principle of Wyoming law. Accordingly, as the Special Master concluded (and as Wyoming does not dispute), Montana should now go forward with seeking to prove its other three theories of breach.

I. THE COMPACT PROTECTS PRE-1950 USERS IN BOTH STATES FROM ENCROACHMENT BY POST-1950 USERS

Although Montana's exception focuses on the increased-efficiencies theory of a violation of Article V(A) of the Compact, illustrating why that exception should be overruled requires a discussion of the three different tiers of regulation set out by Article V. Both of Montana's areas of disagreement with the Special Master are premised on the notion that Article V(A) awards Montana a quantity of water, whereas the Special Master correctly understood that Article V(A)'s protection for the States is linked to particular water *rights* held by individual users.

As Montana has urged, as the Special Master correctly concluded, and as Wyoming no longer disputes,[1] Article V(A) provides enforceable protection to the water rights existing in both Wyoming and Montana as of January 1, 1950. See, *e.g.*, Mont. Exception Br. 17-18; Report 37; Mont. Br. in Resp. to Mot. to Dismiss 27-35. Those rights to water *already appropriated* are in the first tier of Compact protection; they take priority over the rights in the second and third tiers, *i.e.*, rights to the waters that were "unused and unappropriated * * * as of January 1, 1950." Compact Art. V(B), 65 Stat. 666. Thus, the Compact ensures that in times of shortage, downstream users in Montana who hold pre-1950 water rights are protected against interference by upstream users in Wyoming who hold only post-1950 water rights, or who exceed their pre-1950 water rights.

In affording its protection and allocation, however, the Compact divides water into only three categories: pre-1950 rights that already had full water supplies; pre-1950 rights that lacked a sufficient water supply and thus required a supplemental water right; and post-1950 rights. See Compact Art. V(A) and (B), 65 Stat. 666. The Compact did *not* subdivide the first category and give some pre-1950 users in one State priority over other pre-1950 users in the other State. See, *e.g.*, Mont. Exception Br. 33 (acknowledging that "the States intended to avoid interstate administration across state lines"); Report 32-34. Indeed, the negotiating history of

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[1] Wyoming has not filed exceptions arguing that the motion to dismiss should be granted in its entirety, and an order by this Court denying the motion to dismiss will be "subject to the general principles of finality and repose" throughout the remainder of this litigation. *Wyoming* v. *Oklahoma*, 502 U.S. 437, 446 (1992) (quoting *Arizona* v. *California*, 460 U.S. 605, 619 (1983)).

the Compact shows that Wyoming resolutely opposed any such rule of interstate administration. See Special Master J.A. 67, 71 (Compact Commission meeting minutes).[5] Rather, as both the Secretary of the Interior and the federal representative to the Compact negotiations explained to Congress, "little could be gained, from a water supply standpoint, by attempting * * * the regulation and administration of existing appropriative rights in the signatory States." S. Rep. No. 883, 82d Cong., 1st Sess. 11 (1951) (Senate Report); accord *id.* at 6-7; H.R. Rep. No. 1118, 82d Cong., 1st Sess. 2 (1951) (House Report).

Thus, the Compact's first tier only protects pre-1950 water rights in one State against interference that is not authorized by a pre-1950 water right in the other State. The Compact drafters did not even attempt to quantify the first tier of protection by cataloguing the existing rights. Indeed, as the drafters recognized, that would have been an extraordinarily time-consuming and difficult task, given the state of recordkeeping at the time. See Special Master J.A. 232 (Engineering Committee letter, explaining that "[i]t would be a major research project to place existing rights in all States on an equivalent basis," because of "insufficient data" and "differences in the water laws of the States involved"). That was particularly so in Montana, which at the time of the Compact lacked a permit system for quantifying appropriative rights. See Report 22; see also, *e.g.*, Al Stone, *Montana* 1, in 4 *Waters and Water Rights*, Pt. XI, Subpt. B (Robert E. Beck & Amy K. Kelley eds., 3d ed. 2009) (Until 1973, "nearly all Montana water rights

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[5] "Special Master J.A." denotes the joint appendix submitted to the Special Master. See Report 3.

were either 'use rights' for which there were no records at all, or rights represented by posting and filing prior to commencing the appropriation works. There was no provision for filing a notice of completion, so there was no way of knowing how much water was actually diverted or put to a beneficial use, or even whether any water at all was ever appropriated.").

The drafters' decision not to quantify existing water rights confirms that the Compact's first tier protects those rights themselves, not a quantity of water computed by taking a snapshot of particular irrigation practices or crops irrigated under those rights at the time of the Compact. The drafters understood that Wyoming had a larger share of the existing rights, and they accordingly gave Montana a larger share of the unappropriated third-tier water than had previous drafts. See Report 20-21. But that understanding was only approximate, yet the drafters concluded that the Compact should go forward. See Special Master J.A. 233.[6]

That fact refutes Montana's notion that the Compact entitles it to a specific quantity of water, rather than to

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[6] Montana argued before the Special Master that Wyoming's view of Article V(A)—that it preserved existing rights as a matter of state law and did not make them enforceable under the Compact—was untenable because it would fail to "remove all causes of present and future controversy," as the Compact preamble recited. *E.g.*, Mont. Br. in Resp. to Mot. to Dismiss 23-27. The Special Master rejected Wyoming's view and agreed with Montana that Article V(A) provides enforceable and binding protection for first-tier water rights in the two States. Report 22-25. Montana now argues (Exception Br. 39) that the Special Master's view, too, is untenable because it, too, would fail to "remove all causes of present and future controversy," and that only awarding Montana a quantified allocation of water *independent* of individual water users' rights would provide such a resolution. As shown in the text, that view was not shared by the Compact's drafters.

the specified protection for its pre-1950 water rights. Montana is thus wrong in asserting (Exception Br. 9) that "[t]he Special Master correctly found that [the Compact] obligates Wyoming to deliver at the state line a block of water sufficient under the stream conditions then in existence to satisfy Montana's pre-1950 rights." See also *id.* at 14, 24, 38. The cited page of the Special Master's report refers not to a block of *water*, but to "block protection for all existing, pre-1950 appropriations, without attempting to quantify the amounts of those appropriations." Report 21. The Special Master's point—which is correct—is that the Compact drafters protected pre-1950 rights as a block precisely because the drafters did not know the exact scope of the individual rights, and concluded they did not need to know. See, *e.g.*, Report 28 (explaining that "the drafters of the Compact chose not to require Wyoming to deliver a specific, fixed quantity of water to its border with Montana"). Although pre-1950 water users in both States must be satisfied before post-1950 water users in either State, if there is insufficient water to satisfy both States' pre-1950 users, the Compact does not require one State (presumably Wyoming, the upstream State) to curtail its pre-1950 water users' full enjoyment of their appropriative rights so that pre-1950 water users in the downstream State can fully enjoy theirs.[7]

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[7] This case does not present the question whether, if Wyoming's pre-1950 users in Wyoming were consuming a disproportionately large share of water in a time of shortage and leaving little or none for Montana's pre-1950 users, Montana could sue in this Court for an equitable apportionment of pre-1950 water rights. See, *e.g.*, *Nebraska* v. *Wyoming*, 325 U.S. 589, 608-610, 616-618 (1945). Montana has not pleaded any such claim. Rather, Montana contends that it is entitled to satisfy all of its pre-1950 rights before Wyoming does, such that Wyoming

Accepting the Special Master's understanding of the Compact, including the fact that it does not entitle Montana to delivery of a specific quantity of water, fatally undermines each of Montana's theories, as explained below.

II. THE COMPACT DOES NOT OVERRIDE PRE-1950 WYOMING WATER USERS' APPROPRIATIVE RIGHT TO ELIMINATE INEFFICIENCIES

Montana's primary submission is that the Compact is breached if, at a time when pre-1950 water users in Montana are short, a pre-1950 water user in Wyoming uses the water he diverts more efficiently than he did in 1950, such that although the same amount of water is diverted today as in 1950, at the same point and for the same use on the same acreage,[8] less of the diverted water *returns* to the river. For example, using a sprinkler system rather than flood irrigation allows crops to consume more water and leaves less water to return to the stream as return flows. Mont. Exception Br. 3.

Montana does not appear to dispute that under Wyoming law, the irrigator's (pre-1950) appropriative right includes the right to reap the benefit of any efficiency gains himself. Indeed, if that were not the case, the more efficient irrigation could be enjoined—and any Compact breach necessarily averted—under Wyoming law by anyone with a priority date *after* 1950 (but before

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would be first to bear the burden of any shortfall so severe as to affect pre-1950 users as well as post-1950 users.

[8] Montana separately alleges that Wyoming users have in fact used their pre-1950 diversions to irrigate *new* acreage that was not irrigated in 1950. Compl. ¶ 10. The Special Master agreed that that allegation, if proved, would establish a breach of the Compact, Report 40-41, 89, and Wyoming has not excepted to that conclusion.

the implementation of the more efficient method) whose water rights were adversely affected as a result. Rather, Montana contends that *even if* the diversion is in accordance with the state-law water right, it exceeds the pre-1950 appropriative right that is protected by Article V(A). In Montana's view, therefore, the Compact treats the additional increment of consumption as a post-1950 use that, in times of shortage, must yield to pre-1950 uses in Montana.

The Special Master correctly concluded that the Compact does not override any appropriative right to recoup increased efficiencies, nor does it specifically allocate return flows as of 1950 to Montana. As discussed above, the central structural feature of Article V(A), the Compact's first-tier protection, is that it protects *pre-existing* state-law water rights. Montana has not identified anything in the Compact's text, structure, or history suggesting an intent to modify or override those state-law rights with respect to efficiency gains.

A. The Text Of The Compact Does Not Override Wyoming Users' Pre-1950 Appropriative Rights

The first tier of protection under the Compact applies to "[a]ppropriative rights to the *beneficial uses* of the water of the Yellowstone River System." Art. V(A), 65 Stat. 666 (emphasis added). The Compact, in turn, defines "Beneficial Use" to mean "that use by which the water supply of a drainage basin is depleted when usefully employed by the activities of man." Art. II(H), 65 Stat. 665. Contrary to Montana's argument, the use of the term "depleted" in the definition of "[b]eneficial [u]se" does not affect the interpretation of the operative provision, Article V(A), in any way that helps Montana.

1. As the Special Master explained, "beneficial use" is a central concept in the doctrine of appropriation followed in Montana, Wyoming, and many other western States. *E.g.*, Report 4-5, 61. Under the doctrine of appropriation, the first person to appropriate water "'for a beneficial use'" gains a right to that water that is superior to any later appropriator's right, "but only 'to the extent of his actual use,'" leaving excess water free for future appropriators. *Andrus* v. *Charlestone Stone Prods. Co.*, 436 U.S. 604, 615 (1978) (quoting *California Or. Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142, 154 (1935)); accord *Arizona* v. *California*, 373 U.S. 546, 555 (1963); 2 Clesson S. Kinney, *A Treatise on the Law of Irrigation and Water Rights* § 691, at 1194-1195 (2d ed. 1912) (Kinney). "Beneficial use" (or "useful[] employ[ment]," Compact Art. II(H), 65 Stat. 665) is a very broad concept, see, *e.g.*, *id.* §§ 690-691, at 1193-1194; *Basey* v. *Gallagher*, 87 U.S. (20 Wall.) 670, 683 (1875), although state law may decline to recognize some purposes as beneficial, see, *e.g.*, *Osnes Livestock Co.* v. *Warren*, 62 P.2d 206, 214 (Mont. 1936) (diversion purely to maintain a swimming pool or fish pond not then considered a beneficial use). The chief purpose of the "beneficial use" requirement is to prevent both waste and hoarding by ensuring that appropriators cannot assert a right to more than they need and can use. See, *e.g.*, *Basey*, 87 U.S. (20 Wall.) at 683 ("It must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual.").

The definition of "[b]eneficial [u]se" in Article II(H) fits neatly with that well-established concept. Article V(A) expressly incorporates "the laws governing the

acquisition and use of water under the doctrine of appropriation," 65 Stat. 666, and the Compact's definition of "[b]eneficial [u]se" fits with what was already the law in both Montana and Wyoming: that state-law water rights, and hence the first tier of the Compact, will not protect water diversions for a non-beneficial use, *i.e.*, water that will not be usefully employed.

2. Nothing in Article II(H)'s definition of "[b]eneficial [u]se" supports Montana's assertion that the Compact *supersedes* the relevant principle of Wyoming water law. Montana does not allege that Wyoming awarded any pre-1950 water rights for uses that should be deemed non-beneficial, or that Wyoming users in 1950 (or later) appropriated wastefully large amounts that exceed what their beneficial use could justify. Rather, Montana contends (Exception Br. 18-19, 25-28) that, of its own force, the Compact's definition of "[b]eneficial [u]se" overrides any Wyoming water-law principle that allows appropriators who improve the efficiency of their irrigation method to reap the benefit of the improvement rather than maintaining the same return flows that previously occurred with less efficient methods. That is so, Montana argues, because the definition of "[b]eneficial [u]se" refers to "use by which the water supply of a drainage basin is *depleted* when usefully employed by the activities of man." Compact Art. II(H), 65 Stat. 665 (emphasis added).

The Special Master correctly rejected that contention, for two reasons. "Beneficial [u]se" is not defined to be synonymous with depletion, as Montana would have it. And even if it were, water that is diverted for beneficial use, but lost in the course of the diversion, does cause water in the river to be "depleted," and thus beneficially used, as the Compact uses those terms.

a. First, beneficial use, as defined in Article II(H), must *involve* a depletion, but the beneficial use is not confined to the depletion itself or, as under Montana's even narrower formulation, to actual crop consumption. When water is diverted from the river system and put to a useful purpose, "the water supply of [the] drainage basin *is* depleted" by that diversion and use, Compact Art. II(H), 65 Stat. 665 (emphasis added), and the textual definition of "[b]eneficial [u]se" is therefore met, even if some of that water later indirectly makes its way back into the river system. See Wyo. Reply to Mont. Exception 20 (Wyo. Exception Reply Br.); cf. Compact Art. II(G), 65 Stat. 665 ("The terms 'Divert' and 'Diversion' mean the taking or removing of water from the Yellowstone River or any tributary thereof when the water so taken or removed is not returned *directly* into the channel of the Yellowstone River or of the tributary from which it is taken.") (emphasis added).

The reference to "deplet[ion]" in the Compact is properly read to refer to the venerable water-law principle that, to acquire a property right to use water, the appropriator must remove that water from the stream. See, *e.g.*, 2 Kinney § 722, at 1242-1243 (appropriation requires "an actual diversion of the water," because "no possession or exclusive property can be acquired while it is still flowing * * * in its natural channel or stream"); Wyo. Exception Reply Br. 20-21. Thus, as Wyoming explains, the Compact precludes the party States from treating purely in-stream uses of water as "beneficial uses" for Compact purposes. *Id.* at 21.[9] But that principle has no relevance here: irrigation is a ben-

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[9] Several western States now recognize in-stream uses as "beneficial use." *E.g.*, Mont. Code Ann. § 85-2-102(4)(d) (2009).

eficial use, whether or not the irrigation method involves some inefficiencies that yield return flows.

Moreover, the Compact preserves "appropriative rights," not "deplet[ions]." The operative provision, Article V(A), gives first-tier protection to "[a]ppropriative rights to the beneficial uses of the water of the Yellowstone River System existing in each signatory State as of January 1, 1950." 65 Stat. 666. Under Wyoming law, the relevant set of pre-1950 water users have "[a]ppropriative rights" to divert water from the river system (the same amount that they are diverting today) if they put that diverted water to beneficial use (the same beneficial use as today). And that use—irrigation—plainly is one that depletes the water supply. See Wyo. Exception Reply Br. 39-43.

b. Second, even if it were proper to focus only on the particular water flows that, in 1950, were lost and returned to the river following diversion for irrigation, those flows nonetheless were beneficially used. The Compact's reference to "deplet[ion]," without further defining that term, encompasses *temporarily* removing water from the river system; "depletion" need not be read to mean "net depletion" or "permanent depletion." Rather, in this context, both "beneficial use" and "deplet[ion]" are more naturally read to have their established meaning under the doctrine of appropriation: water that is lost during irrigation has long been deemed to be part of the water that the irrigator puts to "beneficial use" and, thus, part of the appropriative right. See, *e.g.*, 2 Kinney § 907, at 1601 ("natural losses of the water in transit" do not constitute "the wast[e] of water"); accord 1 Wells A. Hutchins et al., *U.S. Dep't of Agric., Misc. Pub. No. 1206, Water Rights Laws in the Nineteen Western States* 498, 512-513 (1971) (Hutchins); 1 Samuel

C. Wiel, *Water Rights in the Western States* § 488, at 526-527 (3d ed. 1911).[10] See generally, *e.g.*, *Washington* v. *Oregon*, 297 U.S. 517, 523-524 (1936) (sustaining findings that upstream irrigators' use was "not unduly wasteful"). That is so even though there may be a substantial difference between what is diverted and what actually reaches the fields for which it is diverted. 2 Kinney § 907, at 1601 (up to half the water passing through "the average unlined earthen canals and ditches" never reaches the fields).

Thus, both in 1950 and today, the Wyoming water users were and are "deplet[ing]" "the water supply of [the Yellowstone] drainage basin" by putting that water to "useful[] employ[ment]"—that is, they were and are putting it to beneficial use. The Compact's definition of "[b]eneficial [u]se" does not suggest that the size of the appropriative right should be limited by the extent to which the diversion in 1950 actually resulted in a *net* depletion of the waters of the river system.

B. The Structure Of The Compact Does Not Suggest That It Overrides Wyoming Users' Pre-1950 Appropriative Rights

1. Article V(A) is based on water rights, not a fixed interstate apportionment of water

Montana infers from the structure of the Compact that it creates an "allocation methodology" that is "permanent as long as the Compact remains in effect." Exception Br. 14. The "methodology" for protecting first-tier water rights under the Compact is indeed perma-

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[10] By contrast, waste that could be prevented through the application of reasonable diligence (for example, fixing a leak in a pipe) is not a beneficial use. *E.g.*, 1 Hutchins 512-513.

nent (as all parties and the Special Master generally agree): the appropriative rights existing in 1950 "shall continue to be enjoyed." But Montana's further inference—that the exercise of such rights must be perfectly static—is unsupported.

"[T]he doctrine of appropriation," which regulates those rights, is itself a somewhat dynamic concept, as two examples illustrate. First, and most significantly for Compact purposes, the doctrine of appropriation provides that water rights lapse if the appropriator abandons the beneficial use for which he originally diverted the water. *E.g.*, Report 65-66; *Charlestone Stone Prods. Co.*, 436 U.S. at 615; *Washington* v. *Oregon*, 297 U.S. at 527-528. Thus, as pre-1950 water rights in Wyoming lapse and are replaced by *post*-1950 water rights, the Compact's treatment of those rights will change accordingly (to Montana's benefit).

Second, and conversely, in some circumstances the doctrine confers a right to divert *more* than was actually put to beneficial use at the time of the initial appropriation, if the appropriator had the expanded beneficial use in mind at the time of the diversion and worked with "reasonable diligence" to put the water to it. *E.g.*, 2 Kinney §§ 733-741, at 1266-1283; *Anaconda Nat'l Bank* v. *Johnson*, 244 P. 141, 143 (Mont. 1926). Those are "change[s] by individual water users" (Mont. Exception Br. 14) that nonetheless affect the first-tier protection that one State enjoys.

Accordingly, the inference on which Montana relies —that changes by individual water users should not alter the Compact's overall operative effect on the party States—is simply not a sound one. The Compact drafters chose to give first-tier protection to the pre-1950 water rights already actually held by individuals, rather

than to give a particular quantity or percentage to each State. Therefore, to the (modest) extent that consumption under those pre-1950 water rights changes over time while remaining in accordance with the doctrine of appropriation, the Compact protection will naturally follow along.[11]

Montana's reliance on other compacts, and precedents interpreting them (Exception Br. 15-16), is misplaced. This Compact took a unique approach, as the drafters recognized. Indeed, this Compact (like many others) specifies that the conditions to which it responds are unique and do not set any precedent. See Compact Art. XIV, 65 Stat. 669 (disclaiming any agreement to "the establishment of any general principle or precedent with respect to other interstate streams," because each State's decision to sign the Compact was "actuated" by "[t]he physical and other conditions characteristic of the Yellowstone River and peculiar to the territory drained and served thereby"). And even to the extent it might be appropriate in interpreting one compact to look to similar compacts, the two examples Montana gives are altogether inapposite. Those compacts expressly allocate a particular quantity of water between or among

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[11] To be sure, the Compact is an agreement between States, not among individual water users, and those water users are bound by their States' agreement. See Mont. Exception Br. 13, 15 (relying on *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938)); cf. *South Carolina* v. *North Carolina*, 130 S. Ct. 854, 867 (2010) (States represent their water users in interstate disputes settled by equitable-apportionment litigation rather than compact); *id.* at 874 (Roberts, C.J., concurring in part and dissenting in part) (same). Indeed, the Compact makes that point explicit. See Compact Art. I(A) and (B), 65 Stat. 664. But because this Compact protected each State's first-tier right based entirely on the existing appropriative rights of individual water users, in this case the States are also bound by the rights of their water users.

the signatory States. See Republican River Compact, ch. 104, Art. IV, 57 Stat. 86 (1943) (allocating specific amounts of water, in acre-feet, to each State); *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 96-97 (1938) (quoting La Plata River Compact, ch. 110, Art. II(1)-(3), 43 Stat. 797 (1925)). The drafters of the Yellowstone River Compact expressly did not incorporate such a fixed-quantity approach into *any* of the Compact's three tiers.

2. The Special Master consistently interpreted the Compact's structure

Montana wrongly contends (Exception Br. 20-23) that the Special Master's analysis was inconsistent because the Master rejected Montana's increased-efficiency theory even after accepting its three other theories of Compact breach. As the Special Master correctly explained, Montana's three other theories all allege that pre-1950 users in Montana are short of water at a time when water is being diverted to one or more *post*-1950 uses in Wyoming. Because the Compact protects pre-1950 rights against interference by post-1950 uses, those allegations state a claim of Compact breach. Report 56. Montana's increased-efficiency allegation, by contrast, cannot state a claim under the Compact if it involves only a conflict between pre-1950 rights. Montana protests (Exception Br. 23) that there is "no express exception of any kind from the general rule that pre-1950 rights will be protected." That is incorrect: the Compact does not protect pre-1950 rights against *other* pre-1950 rights, because, as Montana acknowledges elsewhere in its brief (*id.* at 33), the drafters rejected the idea that the Compact would administer disputes between existing rights across state lines.

To be sure, if Montana could establish that irrigating today, using water that was diverted but wasted in 1950, is outside the scope of the pre-1950 water right, it could state a claim for breach of the Compact, because the new practice would be a post-1950 use for purposes of the Compact. As shown above, Montana's claim fails because it cannot make that showing, not because of any inconsistency in the Special Master's reasoning.

C. The Compact's History Further Refutes Any Notion That It Imposed A New Rule Overriding Wyoming Law Regarding An Appropriator's Right To Reduce Inefficiency

Montana contends (Exception Br. 30-31) that the legislative history of the Compact's approval by Congress supports the proposition that the first-tier rights protected by the Compact would be fixed and unchanging, and that "the Compact would not allow one State to cause another State to receive a different supply of water." Exception Br. 30. Montana misreads the relevant Senate Report, which simply explains that the recognition of existing pre-1950 water *rights* does not guarantee that there will always be a sufficient water *supply* to fulfill those rights. See Senate Report 2 (explaining that although "existing appropriative rights as of January 1, 1950, are recognized," "[n]o regulation of the supply is mentioned for the satisfaction of those rights"). That discussion has nothing to do with the scope of the "[e]xisting appropriative rights" that "are recognized," *ibid.*

To the contrary, the history of the Compact's consideration before Congress, including both the Executive Branch's account of its role in the compact-negotiation process and the relevant congressional committees' reports on the legislation approving the Compact, indi-

cates that neither of the responsible Branches of government thought that any pertinent change was being made in the first-tier water rights. Thus, the legislative history confirms that the Compact "recognizes *all* existing beneficial uses as of January 1, 1950." Senate Report 3 (emphasis added); accord *id.* at 11 (Secretary of the Interior's message to Congress); House Report 2.

Furthermore, the other passage from the Senate Report on which Montana relies (Exception Br. 29) undercuts its argument. The Senate Report notes that the allocations of third-tier water, in Article V(B), "take into account return flows and uses of them, as well as original runoff." Senate Report 2. It is certainly true that, to the extent some flows return to the stream and are diverted again, both diversions count. But in computing the percentage allocations under Article V(B), the Compact expressly uses the "*total* diversions," not the net diversions, as Montana suggests. Compact Art. V(C)(1), 65 Stat. 667 (emphasis added); see *id.* Art. II(G), 65 Stat. 665 (defining "Diversion" to include any "taking or removing of water from" the river system "when the water so taken or removed is not returned *directly* into the channel") (emphasis added). Thus, it is not the case that the Compact treats all diversions on a "net of return flow" basis.

The negotiating history of the Compact also refutes Montana's attempt to infer a new limitation on the scope of the protected appropriative right. That history is an appropriate source of interpretive guidance in construing the Compact, which is an agreement among States as well as a federal statute. See *Oklahoma* v. *New Mexico*, 501 U.S. 221, 235 n.5 (1991); *Arizona* v. *California*, 292 U.S. 341, 359-360 (1934); cf. *Zicherman* v. *Korean Air Lines Co.*, 516 U.S. 217, 226 (1996) (applying the

same principle to treaty interpretation). Here that history shows only that the negotiators were well aware of the fact that irrigation efficiency affects return flow, as Montana acknowledges. Exception Br. 29 (citing Special Master J.A. 764).[12] But contrary to Montana's suggestion, there is no indication in the negotiating history that the States agreed to preserve return flows as they were in 1950. The one piece of negotiating history Montana cites, Special Master J.A. 502, comes from a much earlier round of negotiations, in 1939, well before the negotiators had even settled on the idea of preserving existing rights, as Article V(A) ultimately did. See Report 6-7, 20-22, 31-32. The negotiators who agreed on the final Compact generally agreed that the construction of storage, not the preservation of return flows, would be the key element in ensuring that the irrigation needs of the Yellowstone River Basin would continue to be met. See Special Master J.A. 59, 231; Senate Report 6-7 (Federal representative's report); *id.* at 10 (Secretary of the Interior's letter); see also Wyo. Exception Reply Br. 26-28 (explaining the negotiators' rejection of a proposal to put "a ceiling on the depletion to take place upstream") (quoting Special Master J.A. 228).

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[12] Moreover, although Wyoming is correct (Exception Reply Br. 35 n.6) that Montana has not yet made a record about the relative efficiency of sprinklers and other irrigation methods, this Court can take note of the fact that advances in irrigation were well underway at the time of the Compact. See, *e.g.*, Robert M. Morgan, *Water and the Land* 11-17, 19-24, 35 (1993) (detailing the history of sprinkler irrigation since the late 19th century, including the "portable sprinker irrigation * * * heavily utilized" in Nebraska by the time of the Compact's adoption); Terry A. Howell, *Drops of Life in the History of Irrigation*, Irrigation J., Jan. 1, 2000, at 8.

D. Montana Has Not Established That Wyoming Water Rights Are Inconsistent With The Doctrine Of Appropriation

As discussed above, the Compact requires that all first-tier water rights protected by Article V(A) be consistent with "the doctrine of appropriation," which the Special Master construed to refer to the doctrine in general terms, not the law of one or more of the compacting States. Accordingly, the Special Master left open the possibility that a particular water right may be impermissible under the Compact even though permissible under one State's law. Here, however, the Special Master concluded that Wyoming law, Montana law, and the general principles of prior-appropriation law as applied by this Court and by state courts are generally in accord on the relevant principles. See Report 39-40.

Montana contended before the Special Master that the doctrine of appropriation, as applied through the Compact, foreclosed Wyoming from contending that its own water law conferred a right to retain the benefit of increased efficiencies. Mont. Letter Br. 1-12 (July 17, 2009). Montana does not renew that contention here, however: it apparently accepts the Special Master's conclusion that appropriation doctrine does not provide a clear, universal answer to this question, and it contends that the Master should therefore have looked only to the text and structure of the Compact. Mont. Exception Br. 32.[13] As already explained, neither the text nor

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[13] Montana's principal discussion of the doctrine is its assertion that "the Wyoming cases relied upon by the Special Master are inapposite." Mont. Exception Br. 34. To the extent that Montana is read to renew its affirmative argument that the doctrine *forbids* water users from retaining the benefit of increased efficiencies, see *id.* at 35-36, the cases Montana cited to the Special Master do not establish any such clear

the structure justifies denying the protection of Article V(A) to water uses that, under Wyoming law, are within the scope of a pre-1950 water right.

III. MONTANA CANNOT ESTABLISH A BREACH OF THE COMPACT'S FIRST-TIER PROTECTION UNTIL IT SHOWS INJURY TO A RIGHT PROTECTED BY ARTICLE V(A)

In a brief second argument in support of its exception, Montana contends that it should be permitted to show a Compact breach based on injury to its pre-1950 users, irrespective of whether those pre-1950 users can obtain redress under Montana law against water users junior to them. That argument provides no basis for overruling the Special Master's recommendation.

As an initial matter, the Court may wish to leave this issue open for further proceedings before the Special Master. This Court generally prefers to entertain exceptions only after a Special Master has had the opportunity to address the arguments therein. See *United States* v. *Florida*, 420 U.S. 531, 533 (1975) (per curiam). As Wyoming notes (Exception Reply Br. 45), the Special Master raised the issue of intrastate remedies in his initial memorandum opinion and afforded the parties ample opportunity to dispute that and any other issue; Montana did not address intrastate remedies in its re-

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common-law principle. See Wyo. Exception Reply Br. 37-44; U.S. Letter Br. 3-4 (July 24, 2009); Wyo. Resp. to Mont. Letter Br. 4-6 (Aug. 3, 2009); accord, *e.g.*, Wells A. Hutchins, *U.S. Dep't of Agric., Misc. Pub. No. 418, Selected Problems in the Law of Water Rights in the West* 372 (1942) ("[T]he general rule" under prior-appropriation law "is based upon the principle that one should be entitled to the fruits of his labors, where the result is to make available a supply that otherwise would go to waste, and in which event no other party is being deprived of water which he is entitled to receive.").

sponsive briefing before the Master. And the Report does not definitively establish the boundaries of any obligation to pursue intrastate remedies: the Special Master left open, pending factual development, the questions of when intrastate remedies are adequate and do not prejudice Montana's rights under the Compact. Report 28.

To the extent that the Court reaches the question, it should overrule this aspect of Montana's exception. As shown above, Article V(A) of the Compact simply does not follow the model of other compacts that allocate specific amounts or percentages of water to each of the compacting States. See pp. 24-25, *supra*. By choosing the existing appropriative rights, rather than a fixed quantity or percentage, as the basis for the first-tier protections, the Compact contemplates that any claim of injury that Montana can make under Article V(A) must be one based on injury to its pre-1950 water users.[11]

When a pre-1950 water user in Montana is short of water, Montana's law of appropriation permits that user to demand that any other Montana water user with a later priority date cease diversion so that the senior water right may be satisfied. See, *e.g.*, *Granite Ditch Co.* v. *Anderson*, 662 P.2d 1312, 1317 (Mont. 1983) ("We need not cite authority for the proposition that 'first in time, first in right' is the controlling principle."). The Special Master properly recognized that when such an intrastate remedy is available for the injury to a Montana water user, that water user cannot attribute his injury to Wyoming, or to a Compact breach.

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[11] The Special Master concluded that at this point, only Article V(A)'s protection is relevant. Report 35.

Accepting Montana's contrary argument on this point would permit Montana to assert a Compact breach even when Wyoming has done nothing to prevent Montana's pre-1950 users from enjoying their rights under the Compact. Indeed, by forgoing intrastate measures, thereby allowing its post-1950 users to keep their water, and seeking relief against Wyoming on behalf of the pre-1950 users, Montana would effectively be redirecting pre-1950 water to post-1950 users, which the Compact does not permit. Wyoming cannot be required to provide water to post-1950 users in Montana except in accordance with the percentage allocations set out in Article V(B) and (C), which are computed annually and not based on short-term shortages.

CONCLUSION

The exception should be overruled, the motion to dismiss should be denied in accordance with the Special Master's recommendation, and the case should be recommitted to the Special Master.

Respectfully submitted.

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